

**IN THE HIGH COURT OF BOMBAY AT GOA**

**TAX APPEAL NO. 30 OF 2002**

The Commissioner of Income Tax  
Having office at Aayakar Bhavan,  
Patto Plaza, Panaji, Goa.

... Appellant

versus

1. Mrs. Sarita P. Shirke  
Chowgule House,  
Mormugao Harbour.

2. The Income Tax Appellate Tribunal  
Panaji Bench, Aayakar Bhavan,  
Patto Plaza, Panaji-Goa.

... Respondents

Mr. S. R. Rivonkar, Advocate for the Appellant.

Mr. R. Srinivasan with Mr. Sudin Usgaonkar, Advocates for  
Respondent No.1.

**CORAM : S. S. PARKAR &  
V. M. KANADE, JJ.**

**DATE : 2ND AUGUST, 2005.**

**ORAL JUDGMENT(PER V. M. KANADE, J.)**

The Revenue has filed this Appeal under Section 260A

of the Income Tax Act challenging the Judgment and Order passed by the Income Tax Appellate Tribunal and the Order passed by the Assessing Officer.

2. The brief facts which are necessary for deciding this Appeal are as under:-

The Respondent No.1 is admittedly a Non-Resident Indian(NRI) and is a permanent resident in Dubai. She made a gift of Rs.1,00,000/- to Mrs. Madhuri D. Joshi who is a resident of Pune. This gift was made by cheque at Srinagar and the amount was transferred from Vasco Bank to State Bank of India at Srinagar. The Assessee claimed the exemption from payment of Gift-Tax in view of Section 5(A)(ii) of the Gift-Tax Act, 1958. The Assessing Officer however held that the whole exercise of making a gift by issuing a cheque through State Bank of India, Srinagar was a colourable transaction for avoiding Gift-Tax and, therefore, directed Respondent No.1 to pay Gift-Tax on the said transaction. The Deputy Commissioner of Income Tax, however, by his Order dated 12-3-1991 set aside the Order of the Assessing Officer and held that the said transaction was not a colourable transaction. He further held that Respondent No.1

was a Non-Resident Indian and the gift was made in Srinagar where the provisions of Section 5(ii) of the Gift-Tax Act were exempted and, therefore, Gift-Tax Act was not applicable to Kashmir. He, therefore, allowed the Appeal. Against the said Order, the Revenue preferred an Appeal before the Income Tax Appellate Tribunal Panaji Bench. The Tribunal confirmed the findings recorded by the Deputy Commissioner of Income Tax (Appeals) and dismissed the Appeal filed by the Revenue.

3. Against the aforesaid two Orders, the present Appeal has been filed which was admitted by this Court on 24-6-2002 on the following substantial questions of law:-

"B - Whether on the facts and in the circumstances of the case, the transaction of gift of Rs.1,00,000/- made by the assessee in Kashmir in favour of Smt. Madhuri Joshi, r/o Pune, amounts to as colourable device to avoid tax?"

4. The learned Counsel appearing on behalf of the Appellant submitted that the aforesaid transaction of gift was a colourable transaction which had been resorted to solely for the purpose of avoiding tax. He submitted that it was open for the

Court to gather from the circumstances the real nature of the transaction and to draw inference whether the said transaction was made with an intention to escape tax liability. He relied on a Judgment of the Supreme Court in the case of **McDowell And Co. Limited v. Commercial Tax Office** reported in 154 ITR 148. He invited our attention to the observation made by Justice Chinnappa Reddy J who had given a separate concurring Judgment and submitted that in view of the aforesaid observation it was the duty of the Court to examine whether a legal device had been used to avoid tax. He submitted that both the lower authorities had not taken into consideration the ratio of the said Judgment and had not examined whether the transaction was in fact a colourable device to escape tax liability. He submitted that in the present case Respondent No.1 though is admittedly a Non-Resident Indian she was also not residing in Kashmir and had no business or interest whatsoever in Kashmir and on the contrary had interest only in Goa. The Respondent No.1 had made a gift by issuing a cheque on State Bank of India, Srinagar and this amount was transferred from Bank balance from Vasco to Kashmir. He further submitted that the donee Mrs. Madhuri Joshi is a resident of Pune and she also had no business or other interest in Kashmir. He, therefore,

submitted that this was clearly a colourable transaction for avoiding the Gift-Tax.

5. Mr. R. Srinivasan, the learned Counsel appearing on behalf of Respondent No.1 submitted that the question of law which was framed was not a substantial question of law. He submitted that whether a transaction amounts to a colourable device or not is a question of fact and since there was a concurrent finding given by the two lower authorities it was not open for the High Court to interfere with the concurrent finding of fact while exercising its jurisdiction under Section 260A of the Income Tax Act. He relied on 3 Judgments of the Supreme Court in support of the said submission. He further submitted that the Judgment in the case of **McDowell And Co. Limited v. Commercial Tax Office**(supra) had been overruled by the Supreme Court in the case of **Union of India and another v. Azadi Bachao Andolan and another** reported in Income Tax Reports Vol.263 page 706. He also submitted that this case was also further directly covered by the Judgment of the Gujarat High Court in the case of **Commissioner of Gift-Tax v. Dipak A. Sheth** reported in Income Tax Reports Vol.254 page 236. He also relied on a Judgment of the Delhi High Court in the case of

**Commissioner of Income-Tax v. Antartica Investement Pvt. Ltd.** reported in Income Tax Reports Vol.262 page 494.

6. In our view, it is not possible to accept the submission made by the learned Counsel appearing on behalf of the Appellant. Section 5(ii) reads as under:-

**"S. 5. Exemption in respect of certain gifts.--**(I) Gift-tax shall not be charged under this Act in respect of gifts made by any person--

- (i) of immovable property situate outside the territories to which this Act extends;
- (ii) of movable property situate outside the said territories unless the person--
  - (a) being an individual, is a citizen of India and is ordinarily resident in the said territories, or
  - (b) not being an individual, is resident in the said territories, during the previous year

in which the gift  
is made".

7. The Section clearly contemplates grant of exemption to individuals who are not ordinarily residing in India and secondly where movable property is given by way of gift outside the territory in India. A gift, therefore, which is made in Kashmir would therefore fall outside the purview of Section 3 of the Gift-Tax Act as it is specifically exempted by Section 5(ii).

8. In the present case, it is an admitted position that Respondent No.1 is a Non-Resident Indian who is permanently residing in Dubai. She had come to Kashmir and there she had issued a cheque in favour of Mrs. Madhuri Joshi for an amount of Rs.1,00,000/-. Section 5, Sub-Clause (ii) clearly contemplates a situation where a movable property situate outside Indian territory if it is gifted by a person who is not ordinarily residing in India is exempted from gift-tax. In our view, it cannot be said that the said transaction is a colourable device for the purpose of avoiding Gift-Tax. Respondent No.1 being a resident of India could very well issue a cheque from Dubai and still she would not be liable to pay Gift-Tax and there is an exemption from payment of tax in Dubai. In the present case, the admitted position is that Respondent No. 1 had come directly to Kashmir from Dubai

and had landed at Srinagar via Delhi and thereafter had issued the said cheque. It is not possible, therefore, to come to a conclusion that this was a colourable device for avoiding tax. In any case, even otherwise if a person is entitled to an exemption in law and he accordingly makes a plan for avoiding the tax liability which is otherwise legally entitled to it would not amount to a tax evasion. The Supreme Court in a recent case in the case of **Union of India and another v. Azadi Bachao Andolan and another** (supra) has to a very large extent watered down the ratio laid down in **McDowell And Co. Limited v. Commercial Tax Office**(supra) and has observed that the observations made by Chinnappa Reddy, J. in the said Judgment do not necessarily reflect the observations of the other Hon'ble Judges. The Supreme Court in this Judgment has considered the majority view and the view taken by Chinnappa Reddy, J. and has observed that the majority Judgment in **McDowell And Co, Limited v. Commercial Tax Office**(supra) had not endorsed the view of Chinnappa Reddy, J. The Apex Court has observed as under:-

"As we shall show presently, far from being exorcised in its country of origin, Duke of Westminster's case [1936] AC 1 (HL); 19 TC 490 continues to be alive and kicking in England Interestingly, even in McDowell's case[1985] 154 ITR 148 (SC), though Chinnappa Reddy J. dismissed the observation of J. C. Shah J. in CIT v. A. Raman and

Company[1968] 67 ITR 11 (SC) based on Westminster's case [1936] AC 1 (HL); 19 TC 490 [68] and Fisher's Executors case [1926] AC 395 at 412 (HL), by saying (page 160 of [1985] 154 ITR) "we think that the time has come for us to depart from the Westminster principle as emphatically as the British courts have done and to dissociate ourselves from the observations of Shah J., and similar observations made elsewhere", it does not appear that the rest of the learned Judges of the Constitutional Bench contributed to this radical thinking. Speaking for the majority, Ranganath Mishra J.(as he then was) says in McDowell's case [1985] 154 ITR 148, 171 (SC):

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges."(emphasis supplied)

This opinion of the majority is a far cry from the view of Chinnappa Reddy J.(page 160) : "In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether a provision should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the

transaction is such that the judicial process may accord its approval to it." We are afraid that we are unable to read or comprehend the majority judgment in McDowell's case[1985] 154 ITR 148 (SC) as having endorsed this extreme view of Chinnappa Reddy J., which, in our considered opinion, actually militates against the observations of the majority of the judges which we have just extracted from the leading judgment of Ranganath Mishra J.(as he then was)."

9. The Supreme Court, therefore, by the said Judgment has clearly watered down the view taken by Chinnappa Reddy J. in **McDowell And Co. Limited v. Commercial Tax Office**(supra). The submission of the learned Counsel appearing on behalf of the Revenue that the ratio of **McDowell And Co. Limited v. Commercial Tax Office**(supra) is applicable to the facts of the present case therefore cannot be accepted.

10. The Gujarat High Court also in the case of **Commissioner of Gift-Tax v. Dipak A. Sheth**(supra) in an identical case has held that the Gift-Tax Act extends to the whole of India except to the State of Jammu and Kashmir and if all the conditions necessary for claiming exemption under Section 5(1)(ii) of the Act are fulfilled the assessee is entitled to get exemption. In the said case, the assessee who was not ordinarily a resident in India had made a gift of cash amount to more than Rs.1,00,000/- in the

State of Jammu and Kashmir and claimed exemption in respect of the said transaction. The High Court held that he was entitled to get the exemption and the gift was not taxable under the provisions of the Act. The ratio of this Judgment in our view, is squarely applicable to the facts of the present case.

11. In the result, the submissions made by the learned Counsel appearing on behalf of the Revenue cannot be accepted. The Order passed by the Income Tax Appellate Tribunal and Deputy Commissioner of Income Tax(Appeals) is, therefore, confirmed. The Appeal is accordingly dismissed.

**S. S. PARKAR, J.**

**V. M. KANADE, J.**

**RD.**